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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CINCINNATI ASSOCIATION FOR THE BLIND,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the blind, visually disabled, and otherwise disabled "clients" who work in a "sheltered workshop" certified by the Department of Labor pursuant to Section 14(c) of the Fair Labor Standards Act are "employees" within the meaning of Section 2(3) of the National Labor Relations Act?
2. If so, whether the National Labor Relations Board abused its discretion and failed to effectuate the purposes of the National Labor Relations Act when it asserted jurisdiction over sheltered workshop clients, even though to do so would limit the ability of the sheltered workshop to provide services to its clients?
3. Whether the National Labor Relations Board abused its discretion by asserting jurisdiction over the clients at some certified sheltered workshops, while declining to assert jurisdiction over similarly situated clients at other certified sheltered workshops, even though the operative facts are legally indistinguishable?
4. Whether the National Labor Relations Board abused its discretion by combining in a single bargaining unit both (a) blind, visually disabled, and otherwise disabled workshop clients and (b) non-disabled regular employees of the sheltered workshop?

PARTIES

The following were parties *amicus curiae* before the Sixth Circuit:

National Industries for the Blind
National Accreditation Counsel for Agencies Serving the Blind and Visually Handicapped
United States Department of Labor
National Federation of the Blind

The Cincinnati Association for the Blind and the National Labor Relations Board are parties identified in the caption. Local 100 of the Truck Drivers, Chauffeurs and Helpers Union did not appear as a party in the Sixth Circuit, except to resist the Motion of the Cincinnati Association for the Blind seeking a Stay of the Mandate of the Sixth Circuit pending this Petition for Certiorari.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, the Cincinnati Association for the Blind, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on March 17, 1982.

PRIOR OPINIONS

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 672 F.2d 567 (6th Cir. 1982), and appears in Appendix A, *infra*, at pp. 1a-12a. The decisions and orders of the National Labor Relations Board in this case are reported at 235 NLRB 1448 (1978) and 244 NLRB 1140 (1979), and appear, respectively, in Appendices B and C, *infra*, at pp. 1b-6b and 1c-12c.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 1982, and appears in Appendix A, *infra*, at pp. 1a-12a. This Petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Jurisdiction in the court of appeals was invoked under Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160 (f).

STATUTES AND REGULATIONS INVOLVED

The text of the provisions of the relevant statutory provisions and regulations are set forth in Appendix D, *infra*, at pp. 1d-8d, and are as follows:

Section 2(3) of the National Labor Relations Act, 29 U.S.C. Section 152(3).
Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(1).
Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(5).
Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. Section 214(c).
The Wagner-O'Day Act, 41 U.S.C. Section 48.
Rehabilitation Act of 1973, 29 U.S.C. Sections 706(11), 721(a)(16), and 721(a)(17).
The Social Security Act, 42 U.S.C. Section 416(i)(1).
Regulations of Wage and Hour Division, United States Department of Labor, 29 C.F.R. Chapter V, Part 525, Sections 525.2(b) and (d), Sections 525.7(a)(2) and (a)(4), and Sections 525.9(a), (f), and (g).

STATEMENT OF THE CASE

The fundamental question raised by this controversy is whether it is appropriate for the National Labor Relations

Board to assert jurisdiction over the "clients" who work in a sheltered workshop under a Sheltered Workshop Certificate issued by the United States Department of Labor.[1] The outcome of this litigation will have far-reaching effects on the more than 2,500 sheltered workshops throughout the country, and their ability to continue to provide sheltered workshops as a service to more than 115,000 disabled workshop clients.

A. The Proceedings Below

The Cincinnati Association for the Blind (hereinafter referred to as the "Association" or the "CAB") seeks a Writ of Certiorari to obtain review of a decision of the Court of Appeals for the Sixth Circuit in which the court enforced an order of the National Labor Relations Board (hereinafter referred to as the "NLRB" or the "Board"). The NLRB's order required the Association to bargain with Truck Drivers, Chauffeurs & Helpers, Union No. 100 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the "Union" or "Local 100") for a bargaining unit which includes blind and disabled clients who work in the Association's sheltered workshop.

The majority of a three-member panel of the Board in *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), ordered an election among all production and maintenance workers in the CAB's sheltered workshop, including blind and otherwise disabled workers. Appendix B. Member Murphy dissented because workshop clients' "welfare and not the financial success of their work activities, was the matter of [the sheltered workshop's] primary

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[1] Sheltered Workshop Certificates are issued pursuant to Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. Section 214(c), and according to 29 C.F.R. Chapter V, Part 525.

concern." *Cincinnati Association for the Blind, supra* at 1449.

In this decision, the majority sought to distinguish *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), in which the Board did not assert jurisdiction over the clients in a sheltered workshop.

Based on the view that the Board majority's decision was contrary to both the evidence in the record and the law, and for the purpose of appealing the case into the federal courts, the Association declined to bargain with the Union.

The Union filed an unfair labor practice charge in which it alleged that the CAB unlawfully refused to bargain with it. An NLRB Complaint containing that allegation was issued. The CAB has consistently argued that the NLRB has improperly asserted jurisdiction over the workshop clients in its sheltered workshop.

On September 18, 1979, a majority of a four-person panel of the Board refused to reconsider its 1978 decision, and held that the Association had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act by refusing to bargain with Local 100, and ordered the CAB to bargain with the Union. Member Murphy again dissented. *Cincinnati Association for the Blind*, 244 NLRB 1140 (1979); Appendix C.

In a decision which has the "proper bounds of judicial action" as its central theme, the Sixth Circuit enforced the Board's order requiring the Association to bargain with Local 100 for a bargaining unit including blind and disabled clients in its sheltered workshop. *Cincinnati Association for the Blind v. NLRB*, 672 F.2d 567, 570 (6th Cir. 1982); Appendix A. The Sixth Circuit accepted the distinctions the Board sought to draw between the operative facts in *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), and those in *Goodwill Industries of Southern California, supra*, even though the "Board's decision . . . is not as detailed as we might like . . . ." 672 F.2d at 573.

During the same period of time, the Board was confronted with a similar controversy involving organizational activity at the Lighthouse for the Blind of Houston. The Board, citing and quoting its decision in *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), ordered the Houston Lighthouse to bargain with the petitioning union with respect to disabled workshop clients. *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1147 (1979).

The NLRB sought to enforce this order in the Fifth Circuit. However, enforcement was denied. *NLRB v. Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981).

The Fifth Circuit found that:

> "the fundamental relation between those individuals [workshop clients] and the Lighthouse is different in many significant aspects from a normal employment relationship." *Id.* at 209.

Citing *Goodwill Industries of Southern California, supra*, the Fifth Circuit found that it would not effectuate the purposes of the National Labor Relations Act to assert jurisdiction over the workshop clients of the Houston Lighthouse and held that the Board's bargaining order was "not supported by substantial evidence." *Id.* at 210.

Thus, the Fifth and Sixth Circuits have reached opposite conclusions in factually and legally similar situations. As the Sixth Circuit acknowledged, "our decision today appears to create a conflict in the law between the Fifth and Sixth Circuits." *Cincinnati Association for the Blind v. NLRB, supra* at 574.

B. Statement of Facts

1. The Nature Of The Cincinnati Association For The Blind.

The Cincinnati Association for the Blind is a charitable, non-profit organization established pursuant to the laws of

the State of Ohio. A-13, A-404 - A-568. (Er. Exhs. 1 and 2(a)-2(k)).[2] It provides a wide variety of services to blind and partially sighted persons. A-13, A-23. Individuals who receive the benefit of one or more of the Associations' services are referred to as "clients".[3] A-26. In addition to visual handicaps, most clients of the Association have multiple disabilities of various kinds, including epilepsy, orthopedic problems, and mental retardation, which compound and often overshadow their visual disabilities. A-30 - A-31, A-126.

The initial contact of each client with the Association is one or more interviews or counselling sessions with a case or social worker. During these sessions, the problems and needs of the particular individual are discussed and explored. The social worker and the client work together to develop a plan of appropriate services "to achieve his particular rehabilitation goal." A-30 - A-31, A-102 - A-103.

The Association provides a full range of services to clients to achieve their individual rehabilitation goals. Among these are:

— Social and counselling services, in which counsellors and social workers seek to help and support clients in dealing with personal, disability-related problems.
— Technical services, such as the low-vision lens service and the talking book machine service, in which technology is applied to specific visual disabilities.
— Orientation and mobility and daily living activities training programs, in which clients learn ways in which to deal with the problems of everyday living.

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[2] References to the Joint Appendix before the Sixth Circuit are to page numbers "A-00". References to exhibits of the Board and the Association are to "Brd. Exh.—" and "Er. Exh.—", respectively.

[3] The term "client" is used by the United States Department of Labor in its regulations concerning sheltered workshops. See 29 C.F.R. § 525.2(d). It is an accepted designation for the recipients of social services from a social service organization such as the Association.

— The sheltered workshop, in which clients satisfy psychological needs, receive training, including vocational rehabilitiation, and supplement financial resources.
— Work evaluation and job placement services, in which the Association assists visually disabled persons in finding work in the competitive job market, that is, where handicapped persons seek work in competition with non-disabled persons.

CAB's annual reports provide a comprehensive summary of the services available. A-23 - A-26, A-29 - A-32, A-116, A-405 - A-568, especially A-483 - A-512 and A-533 - A-554 (Er. Exhs. 2(a)-2(k), especially 2(g) and 2(i)).

2. The Association's Sheltered Workshop.

The sheltered workshop is one of the services provided by the Association as part of the broad spectrum of services which are available to blind and visually handicapped persons. It is available, like the other services of the Association, only when the social worker and the individual client agree that the particular service in question would be beneficial to the individual. A-23 - A-24.

Individuals are eligible for the sheltered workshop and are referred to it by a counsellor or case worker only if their disabilities are so severe that they are unable to work in the competitive job market. A-31, A-99, A-114 - A-115. Because of the severity of their disabilities, approximately two-thirds of workshop clients receive federal social security disability pensions, and/or federal supplemental security income, private disability pensions, or some combination of these forms of aid. A-40, A-44 - A-45.

The purpose of the sheltered workshop program is to provide a work and rehabilitation service to blind persons in an atmosphere tailored to their individual needs by professionals who are educated and trained to provide rehabili-

tation and therapeutic activity for blind and disabled persons. A-18 - A-19, A-122 - A-123.

The workshop client, like other persons, has a psychological need to be useful and productive. A disabled person often feels alone, bored, and unproductive. In the sheltered workshop, he has an opportunity to perform useful, productive activities. It provides an opportunity for socialization, avoids boredom, and promotes dignity and a positive self-image. A-31 - A-32.

Work in the workshop enables workshop clients to become acclimated to a work environment. This acclimation is a part of the vocational rehabilitation process which enables some workshop clients to move from the sheltered workshop environment into the competitive job market. A-24, A-31 - A-32, A-98 - A-99, A-114 - A-115. It is a measure of the severity of their disabilities that only a limited number are able to leave the sheltered workshop for competitive employment.

The workshop program also gives workshop clients a chance to earn money. This is an integral part of the rehabilitation process. It provides necessary, tangible evidence that the work is productive and is essential to the rehabilitation process. It also provides income to individuals who have a need for financial support and no other source of earned income, because they are unemployable in the competitive job market. A-24, A-114 - A-115.

Thus, the workshop services are provided in a sheltered setting, sanctioned by the Department of Labor, and specifically designed to foster the individual rehabilitative and therapeutic goals of workshop clients.

Persons grouped together by the NLRB in a single bargaining unit in the Association's sheltered workshop consist of two separate groups. First are workshop clients who are disabled. Second are four non-disabled regular employees. These non-client employees perform mechanical and electrical maintenance and shipping and receiving.

A-40, A-44 - A-45, A-56, A-66, A-108, A-113, A-116 - A-120, A-127 - A-131, A-145.

Blind and visually handicapped workshop clients generally perform repetitive packaging and light assembly functions which do not require vision. Workshop clients whose handicaps are not sight-related perform portions of these functions for which sight is necessary, primarily support functions necessary to provide work to blind clients. A-35 - A-36, A-123 - A-124, A-143 - A-144. Work performed by clients in the workshop is not all of equal difficulty. Workshop clients perform processes which take into account their particular kind and degree of disability. A-56 - A-58, A-126 - A-129.

The duties of employees and workshop clients are totally different. Non-client employees perform shipping and receiving and mechanical and electrical maintenance. They do not perform the work of workshop clients. Because of their disabilities, workshop clients do not and cannot perform the duties of non-client employees. A-106 - A-107, A-130.

The Association's workshop operates under a Sheltered Workshop Certificate issued by the United States Department of Labor. This certificate exempts workshop clients from portions of the federal minimum wage law. It requires, however, that workshop clients be paid an amount commensurate with the amount paid to persons in competitive industry for performing similar types and quantities of work. This is achieved by paying workshop clients on a piecework basis.[4]

The piecework rate is computed so that workshop clients receive the same pay that employees in competitive indus-

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[4] A very small percentage of workshop clients may be paid on an hourly basis when they are not engaged in direct production work. The applicable hourly rate in these situations is based on the workshop client's demonstrated earning capacity when working on a piece rate. A-65, A-103 - A-104, A-147.

try receive for doing equivalent work. The piecework rate is the same for every workshop client performing the same function. A-132 - A-135.

In addition, pursuant to federal law, a special minimum wage is established for each sheltered workshop and for less productive individual workshop clients. These rates are reviewed and adjusted by the Department of Labor on an annual basis. A-36 - A-37, A-131 - A-136, A-154 - A-157, A-569 - A-572; (Er. Exhs. 3-4)

The non-clients, non-handicapped persons who work in the workshop are paid on an hourly basis. They receive at least the regular statutory minimum wage and are not eligible for coverage under the workshop exemption certificate. A-104 - A-105, A-147 - A-149.

In addition to the sheltered workshop certificate, the special status of sheltered workshops is recognized by Congress in the Wagner-O'Day Act, 41 U.S.C. Section 46-48c. Pursuant to this statute, the federal government supports sheltered workshops by purchasing certain items only from sheltered workshops for the blind and disabled. A-37.

There is a sharp distinction between the disciplinary system applied to workshop clients and that applied to non-client regular employees at the Association. No disciplinary action whatsoever is taken against workshop clients because of their attendance patterns. Instead, the Association views attendance as part of the rehabilitation process, in which workshop clients are counselled to improve their attendance. A-39 - A-41, A-43 - A-45, A-136 - A-139. On the other hand, non-client employees have been disciplined and discharged for failing to adhere to their regular work schedule. A-39 - A-41, A-43, A-103, A-136 - A-137.

The Association also responds to more serious breaches of appropriate behavior by workshop clients differently than it does to similar actions by non-client employees. The Association's responses to such behavior by workshop clients are different, both in philosophy and purpose, than its ac-

tions against non-client employees for similar behavior. This difference is a part of the special sheltered environment provided by the Association's workshop.

The purpose of the workshop is to provide rehabilitation services to workshop clients. Infractions of appropriate behavior by workshop clients, therefore, are treated in the context of the rehabilitative purposes of the workshop. Counselling by social workers is used to attempt to alter inappropriate behavior. A-39 - A-41, A-136 - A-139. For example, insubordination and physical assault of a supervisor, intoxication, and theft are tolerated without discipline, even though these are usually offenses for which discharge is appropriate in industry and for which the Association has discharged a non-client regular employee. A-42 - A-44, A-136 - A-139.

Non-client employees are disciplined progressively. Discharge is the ultimate disciplinary penalty used for inappropriate behavior by the non-disabled regular employees the NLRB has included in the bargaining unit. Non-client employees are disciplined as are employees in industry. A-43 - A-44.

The sheltered workshop is subsidized by the general income of the Association from gifts and bequests. Although the objective of the workshop is to break even, from 1958 through 1965 the workshop operated at a deficit of approximately $50,000 - $60,000 per year. During the eleven years from 1966 through 1976, the sheltered workshop showed a deficit nine times and accumulated a deficit of $42,460. In 1969, the deficit was nearly $70,000, in 1966 it exceeded $50,000, and in 1971, the deficit exceeded $40,000. These deficits have been subsidized by other funds of the Association. A-32 - A-35, A-405 - A-568; (Er. Exh. 2(a) - 2(k)).

REASONS FOR ALLOWING WRIT

Four primary reasons exist for the allowance of the Writ of Certiorari sought by the Association in this case. First, as

is acknowledged by the Sixth Circuit, its decision in this case creates a split between the decision of the Fifth Circuit in *NLRB v. Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), in which the Fifth Circuit held that the assertion of jurisdiction by the NLRB over the clients in a sheltered workshop was improper, and the Sixth Circuit's decision in this case.

Second, the decision of the Sixth Circuit enforces an NLRB decision which is in conflict with other NLRB decisions in analogous situations.

Third, the decision of the Sixth Circuit is in conflict with the intent of Congress to govern work by clients in sheltered workshops through a body of law and regulation which has been established outside of and is inconsistent with the assertion of jurisdiction by the National Labor Relations Board.

Fourth, the decision of the Sixth Circuit leads inevitably to a lessening of the ability of the more than 2,500 sheltered workshops throughout the country to provide the services of a sheltered workshop program to disabled persons.

These issues have begun to come before the Board and the courts with increasing frequency. Their resolution will have a significant impact on sheltered workshops throughout the country and on the more than 115,000 disabled persons they serve. Therefore, it is fully appropriate for the Supreme Court to grant this Petition for Certiorari and to provide guidance to the NLRB and the courts of appeal so that a uniform, reasoned resolution of these difficult issues may be reached.

A. Conflict Between the Fifth and Sixth Circuits

The propriety of the National Labor Relations Board extending its jurisdiction over "employees" to clients in a sheltered workshop has been before two courts of appeals during the last year. The Fifth Circuit held, in *NLRB v. Lighthouse for the Blind of Houston, supra,* that the

> "Lighthouse employment policies are commensurate with its rehabilitative objective. Thus, we conclude that the Board's order is not supported by substantial evidence; that the Lighthouse has not unlawfully refused to bargain with the Union." *Id.* at 210.

The *Houston* case followed essentially the same course through the National Labor Relations Board as did the *Cincinnati Association for the Blind* case. In both, the Board asserted jurisdiction over the disabled clients in a sheltered workshop without setting forth any reasoned bases. In neither did it articulate a substantial, supportable basis for its decision. The Board treated the cases as equivalent, citing its decision in *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), in support of its result in *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1146-1147 (1979). The decisions in both were based on the Board's conclusory finding that the relationship between the clients and the sheltered workshops is governed by commercial or business considerations.

Thus, in analogous factual and legal situations, the Fifth and Sixth Circuits have reached perfectly inconsistent decisions. The Sixth Circuit recognized this fact when it noted that its decision in *Cincinnati Association for the Blind v. NLRB*, *supra* at 574, "appears to create a conflict in the law between the Fifth and Sixth Circuits."

B. Conflict Between Decisions of the NLRB

The Sixth Circuit's decision perpetuates and confirms the arbitrary, capricious, unreasonable, and irreconcilable decisions reached by the NLRB in factually indistinguishable cases involving the primary issue in this controversy.

In *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), a union sought to represent a bargaining unit consisting of all truck drivers, helpers, and mechanics, all of whom were handicapped persons or "clients." The Board

declined to assert jurisdiction with respect to Goodwill's clients because the purpose of the relationship of the handicapped client and Goodwill was to provide "clients (in addition to employment) with rehabilitation, social service, vocational, medical, and legal counseling." *Id.* at 537.

In finding that "this employment relationship is different in many, if not most, significant respects from the normal employment relationship", the Board reviewed the rehabilitative purpose, the "hiring" of clients, the wage structure, and the disciplinary philosophy of Goodwill. On this basis, the Board found that Goodwill had a special relationship with its clients in which it sought to promote their welfare. This special relationship is the result of the service provided by sheltered workshops to their disabled clients by professionally trained persons under certificates issued by the Department of Labor. In *Southern California, supra*, the Board concluded that to "permit collective bargaining in this context is to risk harmful intrusion on the rehabilitative process . . .", and dismissed the union's petition. *Id.*

In its decision in *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), however, a majority of the Board panel sought to distinguish *Southern California, supra*, by suggesting that the Association's sheltered "workshop operation differs materially from the work program in which Goodwill's clients participated." *Cincinnati Association for the Blind, supra* at 1448. The distinctions the Board seeks to draw, however, are unsupported, conclusory assertions for which the Board offers no supporting factual base, are contrary to the evidence in the record or are factually erroneous, and are, in some cases, irrelevant to resolving this controversy.

First, the Board states that the "work program" at Southern California, "and the production associated with it, [is] . . . one element of the rehabilitation plan, not an enterprise in itself." *Cincinnati Association for the Blind, supra*

at 1448. From this, the Board would have it inferred that production in the Association's workshop is an enterprise in itself. However, the Board does not indicate upon what basis in the record it would have this inference drawn.

In fact, the Association's rehabilitation program is multi-faceted. It includes both vocational and non-vocational rehabilitation. The record is undisputed that rehabilitation and therapeutic services to workshop clients constitute the sole purpose of the Association's sheltered workshop. Nowhere in the record is there any evidence that the Association's concern is productivity for its own sake.

Further, if the Board believes that the Association's workshop is geared toward productivity because of the amount of its sales, approximately $2,000,000 in 1976, Southern California's annual sales of more than $4,000,000 show that no distinction can be made based on sales. And it is undisputed that the Association's workshop lost $50,000-$60,000 per year prior to 1966. Since 1965, the Association has lost a cumulative total of over $40,000. No operation where productivity is the primary goal would continue to operate in this situation.

Therefore, like Southern California, the Association's workshop engages in production only as a necessary by-product of rehabilitation. It cannot be said, based on the record, that the Association's production in its workshop is an "enterprise in itself" and the relationship between Southern California and its clients, and Cincinnati and its clients cannot be distinguished on this basis.

Second, the Board's majority in *Cincinnati Association for the Blind, supra* at 1448, stated that Southern California's employees are "paid uniform wages, regardless of performance. . . ." Clients in the Association's sheltered workshop are generally paid on a piecework rate. This perceived difference does not exist.

Workshop clients at Southern California are paid accord-

ing to their productivity, just as are workshop clients of the Association. Wage payments to workshop clients based on productivity are mandated by federal wage-hour law. See §14(c) of the Fair Labor Standards Act, 29 U.S.C. §214(c); 29 C.F.R. Chapter V, Part 525, Sections 525.7(a)(2) and (a)(4) and 525.9(a), (f), and (g). Thus, no distinction actually exists between the methods of payment used by the Association and Southern California.

In addition, the use of piecework rates to reflect productivity is an essential part of the rehabilitation program. They provide needed positive reinforcement to appropriate behavior by clients. For these reasons, the Board cannot rely on any such supposed distinction as a basis for a finding that the Association's operations are based on productivity to a greater degree than are Southern California's operations. According to these criteria, they are equivalent.

The third rationale set forth by the Board majority in its *Cincinnati Association for the Blind, supra*, decision for distinguishing its *Southern California, supra*, decision is that the Association's activities are governed by economic considerations rather than by the goal of rehabilitation. Of course, to a certain extent, the decisions of both the Association and Southern California are governed by economic matters. Both have to pay sufficient attention to economics to maintain a viable entity capable of rendering the rehabilitation services it seeks to provide. However, in each case the sole purpose is to provide, and the actual operation of the workshop does provide, a range of services to blind and disabled persons in order to enhance the quality of their lives. That this is the sole purpose of the Association's workshop is undisputed in the record.

It is indicative of the paucity of any factual basis for its assertions that the "direction" of the Association's workshop is "significantly based on economic considerations", that the Board does not support this generalization with

any evidentiary reference. *Cincinnati Association for the Blind*, *supra* at 1449. Rather, the Board's majority simply restates the same conclusory principle, when it finds that "normal economic considerations are a significant factor" in the workshop-client relationship. *Id.* Again, no factual basis is provided.

However, the same conclusory thought is reiterated for a third time: The workshop-client relationship and "employment conditions" in the sheltered workshop are said to be "guided to a great extent by business considerations". *Id.* Nowhere does the Board majority explain how it has reached this conclusion.

In fact, these conclusory statements are not supported by the record. Yet the Sixth Circuit accepts the baseless distinctions set forth by the Board without critical analysis and with only a comment that "the Board's decision below is not as detailed as we might like. . . ." *Cincinnati Association for the Blind v. NLRB*, *supra* at 573.

The litany of other factors articulated by the Board as the basis for its decision in *Southern California*, *supra*, are all unquestionably present in the Association's sheltered workshop. Thus, the Board has reached contradictory decisions on legally identical facts in these two cases. Therefore, the decision of the Sixth Circuit is not only in conflict with the Fifth Circuit's decision in *NLRB v. Lighthouse for the Blind of Houston*, *supra*, it enforces a Board decision which is irreconcilable with the Board's own decisions in other cases which are legally indistinguishable.

C. Conflict Between Assertion By NLRB Of Jurisdiction Over Sheltered Workshops and Congressional Intent

The operation of sheltered workshops is governed by statutes and regulations which are separate from and inconsistent with the National Labor Relations Act. By en-

forcing the Board's order asserting jurisdiction over the clients in the Association's sheltered workshop, the Sixth Circuit has created conflict between statutory provisions unquestionably governing sheltered workshops and the mandates of collective bargaining under the National Labor Relations Act.

The relationship between the Association and the workshop client is defined by federal wage-hour law. Fundamental to the nature of that relationship is the fact that workshop clients are so severely handicapped that their "productive capacity is impaired" and they cannot "engage in competitive employment". Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. § 214(c). In addition, many workshop clients receive Social Security Disability benefits because they are unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . ." or blindness. 42 U.S.C. §416(i)(1).

Congress has enacted legislation which authorizes and governs the operations of sheltered workshops. Section 14(c) of the Fair Labor Standards Act, 29 U.S.C. §214(c), permits the issuance of a sheltered workshop certificate to a workshop which demonstrates the therapeutic nature of its program. The workshop certificate promotes the workshop program by permitting payment of wages to its clients which are below the standard minimum wage and which are commensurate with the productivity of the client.

Regulations promulgated by the United States Department of Labor, under which the Association's sheltered workshop certificate is obtained, recognize that the traditional employer-union collective bargaining relationship is inappropriate for a sheltered workshop. In any bargaining situation, the potentiality for economic action to enforce bargaining demands exists. However, a strike to enforce bargaining demands might lead to the Association's loss of

its sheltered workshop certificate. The sheltered workshop regulations provide as follows:

> "No special certificate will be issued pursuant to this part 525 when abnormal labor conditions, such as a strike, a lockout, or other similar condition, exists at the workshop for which such certificate is requested." 29 C.F.R. §525.8(d).

This could completely end the Association's ability to provide this service to the handicapped.

The Wagner-O'Day Act, 41 U.S C. §§46-48c, provides that certain government contracts shall be set aside to provide work in sheltered workshops for "blind and of other severely handicapped individuals." Thus, the government seeks to assure the viability of sheltered workshops by providing business to them for which they need not compete with private industry. The Association's workshop has been awarded a number of government contracts pursuant to this legislation, which is intended to provide employment for blind and otherwise severely disabled persons.

The Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, provides for the channeling of federal money to "rehabilitation" facilities, including sheltered workshops, through the various states. See 29 U.S.C. Section 721(a)(16). "Rehabilitation" facilities (29 U.S.C. Section 721(a)(17)) are facilities which offer "vocational rehabilitation services to handicapped individuals . . . and extended employment for those that cannot be readily absorbed in the competitive labor market. . . ." 29 U.S.C. Section 706(11).

Thus, Congress has established and has continued to support a statutory scheme authorizing, supporting, and governing sheltered workshops because of their therapeutic nature. That regulation is inconsistant with the normal economic forces and factors which constitute the basic premise of collective bargaining under the NLRA.

In addition, on several occasions between 1967 and 1976 bills were introduced in Congress which sought specifically to bring sheltered workshops within the scope of the NLRA.[5] None was enacted.

Under all of these circumstances, the Board's assertion of jurisdiction over sheltered workshop clients is in real and substantial conflict with the complex statutory scheme created by Congress which governs the relationship between a sheltered workshop and its clients.

D. Conflict Between Assertion By NLRB Of Jurisdiction Over Sheltered Workshop Clients And The Ability Of Sheltered Workshops To Provide Their Therapeutic And Rehabilitation Services

In 1975 there were more than 2,750 sheltered workshops certified by the Department of Labor, serving more than 115,000 clients. The number of certified workshops has steadily increased.[6] These sheltered workshops provide a desirable service to disabled persons, which Congress has sought to foster, support, and control in a variety of specific ways.

The intrusion of jurisdiction by the NLRB and collective bargaining into this structure would limit the ability of sheltered workshops to provide rehabilitative and therapeutic services to disabled persons. This fact was recognized by the Board in *Goodwill Industries of Southern California*, *supra*.

There the Board held that to permit collective bargaining

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[5] 113 Cong. Rec. 12754 (1967); 113 Cong. Rec. 18355 (1967); 115 Cong. Rec. 7575 (1969); 115 Cong. Rec. 6561 (1969); 117 Cong. Rec. 179 (1971); 119 Cong. Rec. 59 (1973); 122 Cong. Rec. 9176 (1976).

[6] See *The Role of the Sheltered Workshops in the Rehabilitation of the Severely Handicapped*, Greenleigh Associates, Inc. (1975), a professional study conducted pursuant to 29 U.S.C. Section 786, a part of the Rehabilitation Act of 1973.

in a bargaining unit consisting of workshop clients "is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands." Similarly, the assertion of jurisdiction by the Board over the workshop clients in the Association's sheltered workshop would be injurious, because such bargaining is alien to the employer-client relationship present in a sheltered workshop.

The premise of this rationale is that an employer, such as Southern California or the Association, has a unique "concern for the welfare of his employees [which] competes with, and in some sense displaces, the Union's ordinary concern for employee well-being." *Id.* at 537.

The Board in *Southern California, supra*, continues that "[t]o permit collective bargaining in this context is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands." *Id.* Union demands for higher wages, for example, might cause the Association to attempt to "hire" persons who are less severely disabled and more productive in order to be able to continue to serve the same number of persons.

Or it might require a greater subsidy from other Association funds to continue the workshop at its current level, which would divert funds from other services with the resulting diminution of these other services to disabled persons. Therefore, demands for higher wages would be completely inconsistent with the Association's ability to offer the service of a sheltered workshop to more severely handicapped, less productive individuals, even though service to these individuals is precisely the goal of the workshop.

In *Southern California, supra*, the Board noted other inconsistencies between collective bargaining and a sheltered workshop:

> "Union demands for higher benefits for senior employees might tempt the employer to reconsider its pol-

> icy of keeping clients on as long as necessary. Conversely, union demands for unlimited employment tenure could prejudice the employer's efforts to provide charitable employment to as many disabled people as possible." *Id.* at 537-538.

These problems would be of equal importance if the Association were to be required to engage in collective bargaining.

In addition, the normal interplay of economic factors, which constitute one of the basic premises of collective bargaining under the NLRA, would not be present in an economic dispute between a sheltered workshop and a bargaining unit of workshop clients. For example, if a strike occurs in the economic sector, the employer is moved toward resolution of the dispute by lost profits, while employees are moved by lost wages.

On the contrary, a sheltered workshop, which is offered as a service and functions at a deficit, such as the Association's sheltered workshop, is not subject to the loss of profits as a motive to settle a strike. In the context of a sheltered workshop, economic action does not fit. It is useless and incongruous. It is destructive to the relationship between the workshop and the workshop client, and to the stability of the sheltered workshop and its ability to achieve its therapeutic purposes.

In summary, it is inappropriate and does not effectuate the purposes of the Act for the Board to assert jurisdiction over its workshop clients. As the Board stated in the strikingly similar circumstances in *Southern California*, *supra*:

> "The collective-bargaining process, in short, is likely to distort the unique relationship between the employer and client and impair the employer's ability to accomplish its salutary objectives." *Id.*

Therefore, this issue is extremely important to each of

the sheltered workshops in the United States and their clients. Its outcome will fundamentally affect the ability of sheltered workshops to continue to provide services to their clients. The assertion of NLRB jurisdiction over sheltered workshops certified by the Department of Labor will impair their ability to provide their useful rehabilitative and therapeutic services.

CONCLUSION

The Cincinnati Association for the Blind respectfully urges this Court to grant this Petition for Writ of Certiorari, to review these important questions, and to reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 79-1522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CINCINNATI ASSOCIATION FOR THE BLIND, *Petitioner.*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON PETITION for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board.

Decided and Filed March 17, 1982.

Before: MERRITT, MARTIN, and JONES, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. This case comes before us on the petition of the Cincinnati Association for the Blind for review of cease and desist and bargaining orders issued by the National Labor Relations Board. The Board has cross-applied for enforcement of its orders. We must determine whether the Board abused its discretion in deciding that visually handicapped workers at the Association's Sheltered Workshop for the Blind are entitled to the protection of the National Labor Relations Act.

In May, 1977, the Communications Workers of America, Local 440, filed a representation petition seeking certification as the collective bargaining representative of the Workshop employees. At a hearing held in August, 1977,

the Communications Workers disclaimed further interest in the proceedings; however, Local Union 100, a Teamsters affiliate, came forward and asked to be substituted for the Communications Workers as the petitioner. The Board agreed to the substitution. Local 100 sought to represent "all production and maintenance employees" at the Workshop, a group which included both sighted and visually handicapped workers.

Over the Association's objections, the Board decided that the handicapped workers were "employees" covered by the National Labor Relations Act, asserted jurisdiction, and issued a Direction of Election. 235 N.L.R.B. 1448. An election was duly held in June, 1978 and produced a clear union majority. The Association refused to bargain with the Union, whereupon the Union brought unfair labor practice charges. On September 19, 1979, the Board issued the orders presently on appeal. 233 N.L.R.B. 1140.

The Association asks us to hold that its visually handicapped workers fall outside the purview of the Act. In support of this position, it characterizes those workers not as "employees", but as "clients", whose relationship with the Workshop is rehabilitative or therapeutic rather than typically industrial. The Association raises a second issue by objecting to the Board's certification of a bargaining unit which includes both sighted and handicapped workers.

The Board, on the other hand, contends that its application of the Act to visually handicapped workers is entirely consistent with the statutory purpose. It also defends its approval of a single bargaining unit as a proper exercise of discretion.

Before addressing the merits of this case, we believe a brief description of the Cincinnati Workshop is appropriate as background for the legal arguments.

The Cincinnati Association for the Blind is a non-profit corporation dedicated to the interests of visually handi-

capped persons in the Cincinnati area. It is organized into five operationally distinct departments: Finance, Office, Casework, Rehabilitation, and Workshop. The Casework and Rehabilitation departments offer training, counseling, technical and social services to all blind members of the community.

Some of the individuals who make use of the Association's social services are referred by caseworkers to the Workshop for possible employment; final employment decisions, however, are the province of the Workshop Manager. At present, about seventy blind persons and four sighted persons perform jobs at the Workshop under the supervision of a managerial staff which includes, in addition to the Manager, four supervisors, a contract sales representative, and an industrial engineer.

The Workshop produces goods under contract with the federal government and a number of private industries. Some of these contracts are secured pursuant to the Wagner-O'Day Act, some through competitive bidding. The Workshop is involved in several types of production, including a paper conversion manufacturing operation, which supplies over half the adding machine tape and teletype paper used by the federal government, and a sizeable assembly and packaging operation which serves several private corporations. In 1976, the Workshop generated revenues in excess of $2,000,000, $144,000 of which represented profit. The Association used this profit to defray unrelated expenses.

With very few exceptions, the blind workers are paid on a piece-rate basis, whereas the sighted employees are paid by the hour. The Fair Labor Standards Act permits sheltered workshops to pay certain handicapped workers less than the current minimum wage; the Cincinnati Workshop holds a certificate of exemption, issued by the Department of Labor, which authorizes a special minimum wage of $1.49

per hour. The Association's blind workers receive holiday pay, vacation pay, workers compensation insurance, and life insurance. Sighted employees receive the same benefits plus a pension plan. Blind and sighted workers alike have a five-day, 8:30 a.m. to 4:30 p.m. work week.

The Workshop does not suspend or terminate blind workers for production errors; those forms of discipline are reserved for serious cases of misconduct such as violence or theft. However, the workers are expected to produce goods which conform to the quality standards of the marketplace. If a handicapped worker receives two reprimands for production errors, he is referred to the Work Evaluation Unit for "retraining." During assignments to this Unit, workers are either not paid at all or paid at a lower rate than they customarily receive.

The Workshop operation is not designed primarily to provide temporary, on-the-job training which would enable blind workers to secure employment elsewhere. On the contrary, the program contemplates long-term employment at the Workshop. Very few handicapped workers ever leave to enter the competitive job market.

We turn now to the principal substantive issue before us—the Board's application of the National Labor Relations Act to the Association's visually handicapped workers. The Association challenges the decision below on two grounds: first, it contends, the workers in question are not "employees" within the meaning of the Act; and second, even if these workers are statutory "employees", the Board abused its discretion in exercising jurisdiction over them.

We have given both arguments careful consideration and have at length concluded that endorsement of either would exceed the proper bounds of judicial action.

The National Labor Relations Act does not attempt a precise definition of an "employee." Section 2(3) merely states that the "term 'employee' shall include any employee

. . . unless this subsection explicitly states otherwise." 29 U.S.C. § 152(3). None of the statutory exceptions bear on this case.

The Association's most serious legal argument that handicapped workers in sheltered workshops fall outside the purview of the Act rests on the premise that Congress intended to exclude them from coverage. If this contention is valid, then the Board exceeded its statutory jurisdiction here.

We have found nothing in the Act's legislative history to indicate that Congress considered the status of handicapped workers at the time it enacted the statute. The Association points out that between 1967 and 1976 several bills were introduced in the House of Representatives with the following preamble: "A bill to amend the National Labor Relations Act to secure to physically handicapped workers employed in sheltered workshops the right to organize and bargain collectively. . . ." 113 Cong. Rec. 12754 (1967); 113 Cong. Rec. 18355 (1967); 115 Cong. Rec. 7575 (1969); 115 Cong. Rec. 6561 (1969); 117 Cong. Rec. 179 (1971); 119 Cong. Rec. 59 (1973); 122 Cong. Rec. 9176 (1976). At each introduction, this bill was referred to the House Committee on Education and Labor, where it apparently remained. This information, standing alone, is inconclusive of the issue. It reflects only the opinion of the bill's sponsor that the Act in its present form does not protect handicapped workers. We have no indication that a consensus of Congress shares this belief.

In the absence of direct evidence of Congressional intent, the Association asks us to infer from other legislation that the Act does not apply to sheltered workshop workers. It directs our attention to the legislative histories of the Fair Labor Standards Act, 29 U.S.C. § 214(c), the Wagner-O'Day Act, 41 U.S.C. §§ 46-48, and the Rehabilitation Act of 1973,

41 U.S.C. § 701, *et seq.*[1]

According to the Association, these histories demonstrate that Congress has recognized and approved the "rehabilitative" and "therapeutic" function of sheltered workshops. To some extent, at least, this observation is correct. We do not doubt that Congress has indeed sought to benefit the handicapped through legislation favoring sheltered workshops; we are not persuaded, however, that this policy necessarily implies a Congressional intent to exclude handicapped workers from the National Labor Relations Act.

It is the Association's position that the introduction of collective bargaining into the sheltered workshop milieu will inevitably destroy the "therapeutic" effect of the workshop experience on the individual worker. Thus, argues the Association, if Congress was disposed to permit collective bargaining in sheltered workshops, it would not, in other legislation, address the sheltered workshop concept in the language of "rehabilitation" and "therapy."

We perceive two flaws in this argument. First, Congress has not indicated that it shares the Association's belief in the fundamental incompatibility of collective bargaining and any form of "therapy." Neither has it expressed a contrary policy. We simply lack a basis on which to make an informed judgment about "Congressional intent" in this area.

Thus, we confront a choice between attempting to "second guess" Congress on a political and philosophical issue and relying on the broad, unequivocal language of the statute. Inasmuch as we cannot adopt the first course without im-

[1] The Fair Labor Standards Act provides employment opportunities for handicapped workers by permitting workshops to pay wages lower than the prevailing minimum wage. The Wagner-O'Day Act permits the federal government to purchase goods produced at workshops on a noncompetitive basis. The Rehabilitation Act of 1973 entitles sheltered workshops to financial assistance for certain programs which offer vocational rehabilitation services to handicapped persons.

pinging on the legislative function, we feel constrained to pursue the latter. Accordingly, we decline to carve out an exception to the plain language of Section 2(3) of the Act.

In this context, we note that the present case differs significantly from *NLRB* v. *Bell Aerospace*, 416 U.S. 267 (1974). There, after a detailed examination of the Act's pre- and post-enactment history, the Supreme Court held that "managerial employees" belong to a class "so clearly outside the Act that no specific exclusionary provison was thought necessary." *Id.* at 283. The *Bell Aerospace* Court had the benefit of an extensive legislative history which permitted it to assess Congress' intent with some confidence. No such insight into Congress' position on the present issue is available to us.

Our second objection to the Association's argument lies in its apparent assumption that the primary, overriding concern of all sheltered workshops is to provide the handicapped with "therapy" and "rehabilitation." Even if we are willing to impute to Congress the Association's theory that collective bargaining has no place in a therapeutic environment, we would have reservations about inferring a blanket exemption from the Act for all sheltered workshops. Although all sheltered workshops presumably have some connection with programs geared to providing social services, the evidence in this and other cases strongly suggests that this "rehabilitative" and "therapeutic" nexus is, in some instances, subordinated to routine business considerations. Thus, even if Congress intended to exempt all *primarily* therapeutic institutions from the Act, some sheltered workshops would fail to qualify.

In practice, the Board has apparently adopted a policy based on this very distinction. It examines workshop operations on a case by case basis and determines whether the guiding principle of each is "rehabilitative" or typically industrial. In its discretion, it then exempts those which fit

the former description and asserts jurisdiction over those which display significant economic purposes. *Compare, Goodwill Industries of Southern California*, 231 N.L.R.B. 536 (1977), and *Goodwill Industries of Philadelphia*, ——N.L.R.B. —— (1978); with *Chicago Lighthouse For the Blind*, 225 N.L.R.B. 249 (1976), *Lighthouse for the Blind of Houston*, 244 N.L.R.B. 1144 (1979), *enforcement denied*, 653 F.2d 206 (5th Cir. 1981), and the present case. Thus, under present Board practice, workshops which are truly primarily oriented toward providing social services need not fear any potential adverse impact collective bargaining might have on their programs. On the other hand, workers at workshops which closely resemble traditional, for-profit business enterprises enjoy the same legal protections as their counterparts in private industry.

Congress, of course, is free to alter this system of case by case adjudication at any time, and in any manner it sees fit. That it has not yet done so suggests that it is satisfied with the present state of affairs.

Having determined that sheltered workshop workers are not, as a matter of law, excluded from the Act, we must decide if the Board had an adequate factual basis for characterizing these particular workers as "employees."

NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), established that the Board enjoys wide discretion in determining an individual or group's "employee" status. As a corollary to this discretion, Board decisions in this area are subject to limited judicial review. "[I]n reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's . . . [T]he Board's determination that specified persons are 'employees' under the Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131; *see also Bayside Enterprises* v. *NLRB*, 429 U.S. 298, 304 (1977); *Physicians National House Staff Assn.* v. *Fanning*, 642 F.2d 492 (D.C.Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

Given this standard of judicial review, we have no difficulty upholding the factual inferences which led to the Board's conclusion that these handicapped workers are "employees" under the Act. The Appellant's arguments on this question are variations on a single theme — that the relationship between Workshop and workers differs in certain respects from the norm associated with private industry and that the blind workers are therefore not "true" employees. Our review of the record, however, indicates that the Board took into account the special characteristics of sheltered workshops but remained unpersuaded that these particular handicapped workers were thereby transformed into something other than statutory "employees." The Charging Parties below documented in detail the extent to which the blind workers operate under terms and conditions typical of "employment." The Board, in its discretion, apparently concluded that the similarities between these workers and their counterparts in private industry outweighed the differences. On the present record, we are unprepared to require the Board to shift its emphasis and reach a contrary result.

We now consider the Association's alternative contention that even if its workers are statutory "employees", the Board should have declined to assert jurisdiction in this matter. In support of its argument that the exercise of jurisdiction here "would not effectuate the purposes of the Act", the Association again advances the theory that "rehabilitation" and collective bargaining are antagonistic concepts. In particular, it directs our attention to the Board's decision in *Goodwill Industries of Southern California, supra*. There, the Board did in fact decline jurisdiction over disabled workers on the premise that collective bargaining would disrupt the rehabilitative relationship between employer and employee. The Association contends that *Southern California* and the present case are indistinguishable on their facts and asks us to reverse the

Board for failure to treat similarly situated persons in the same manner.

Once again, the Association has entered an area of Board discretion which is subject to limited judicial review, *Glen Manor Home for the Jewish Aged* v. *NLRB*, 474 F.2d 1145 (6th Cir. 1973); *NLRB* v. *Austin Developmental Center*, 606 F.2d 785 (7th Cir. 1979).[2] The Board's decision at the Representation stage of these proceedings reveals that the result in this case was based on a finding of fact that economic motives prevail at the Cincinnati Workshop despite the Association's professed "therapeutic" orientation. "The Employer's direction of the workshop is significantly based on economic considerations . . . Normal economic considerations are a significant factor in the Employer-"client" relationship. The Employer's relations with workshop "clients" and the employment conditions existing at the workshop are guided to a great extent by business considerations." 235 N.L.R.B. at 1449. On the present record, we cannot say that the Board's conclusion was an abuse of discretion.

Furthermore, although the Board's decision below is not as detailed as we might like, we believe it does adequately distinguish the facts of the present case from those of *Southern California, supra*. In the first place, the Board emphasized in *Southern California* that its decision did not stand for the proposition that it would decline jurisdiction

[2] Generally, when the courts speak of the Board's "discretionary jurisdiction", the question under consideration is whether an employer's activities have sufficient impact on commerce to warrant the exercise of jurisdiction. *See* 49 U.S.C. § 164(c). In this case the Association does not pursue a "commerce issue." As a matter of legal nicety, it might be preferable to subsume this discussion under the heading of the Board's determination of statutory "employee" coverage. However, throughout this proceeding, the parties and the Board alike have referred to the Board's action below as the assertion of "discretionary jurisdiction." Inasmuch as the same standard of judicial review applies regardless of the way we frame the issue, we have, for purposes of clarity, attempted to "track" the presentation adopted by the parties and the Board.

in all cases involving sheltered workshops. It referred to that case as the "rare, possibly nonrecurring instance where an employer's concern for the welfare of his employees competes with, and in some sense displaces, the union's ordinary concern for employee well-being." 231 N.L.R.B. at 537.

Second, in *Southern California*, Goodwill Industries reserved fifty percent of its job openings for the short-term training of workers who soon moved on to find employment in the competitive market. Thus, in a very real sense, Goodwill operated a rehabilitative vocational clinic; it had on its staff a full-time job placement specialist to help trainees find permanent employment elsewhere. By contrast, the Association's workshop offers long-term employment with little emphasis on the acquisition of skills other than those required for Workshop production.

At Goodwill, counseling and other social services were an integral part of a worker's relationship with the employer. As the Board observed, "Goodwill's work program, and the production associated with it, was one element of the rehabilitation plan, not an enterprise in itself." 355 N.L.R.B. at 1448. On the other hand, workers at the Cincinnati workshop who wish to obtain social services must seek them in the same manner as other blind members of the community.

In short, we agree with the Board that the circumstances of the *Southern California* case differ materially from the situation at the Cincinnati workshop. We therefore reject the Association's contention that the Board's action constituted an abuse of discretion.

Finally, in a separate issue, the Association challenges the Board's certification of a bargaining unit which includes both sighted and handicapped employees. It cites as the basis for its objection certain differences in the Workshop's disciplinary policy toward blind and sighted workers,

the piece-work versus hourly rate wage structure of the two groups, and the sighted workers' participation in the Association's pension plan. The Board, however, found these minor differences insufficient to affect the "appropriateness" of a bargaining unit in which all employees work closely together and serve interdependent functions. We agree, and decline to disturb this exercise of the Board's discretion. *See Michigan Hospital Service Corp.* v. *NLRB*, 472 F.2d 293 (6th Cir. 1972); *NLRB* v. *Southern Metal Service*, 606 F.2d 512 (5th Cir. 1979).

In c ncluding our discussion of this case, we note that we are aware of the Fifth Circuit's recent refusal to grant enforcement of the Board's orders in *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981). Although our information about the facts underlying that case is incomplete, our decision today appears to create a conflict in the law between the Fifth and Sixth Circuits. In this context, suffice it to say that we do not depart lightly from the principle of uniformity in the federal court system; on the contrary, we have reached our present conclusion only after lengthy deliberation on the respective functions of Congress, the Board, and federal Court of Appeal.

Enforcement granted.

APPENDIX B

Cincinnati Association for the Blind *and* Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 9—RC—12066

May 5, 1978

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

Upon a petition duly filed on May 18, 1977, under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on August 31, 1977, before Hearing Officer Jay M. Presser.[1] Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 9 transferred this case to the Board for decision. Thereafter, the Employer and the Petitioner filed supporting briefs and the National Federation of the Blind filed an *amicus curiae* brief.

Pursuant to the provisons of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby approved.

Upon the entire record, the Board finds:

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[1] The petition was filed by Communication Workers of America Local 4400 which, at the hearing, disclaimed interest in representing any of the Employer's employees and moved to withdraw from the proceeding. Truck Drivers, Chauffeurs and Helpers Local Union No. 100 intervened at the hearing, submitted a showing of interest sufficient to support a petition, and moved to substitute itself as the Petitioner. We hereby grant both motions and designate Truck Drivers, Chauffeurs and Helpers Local Union No. 100 as the Petitioner.

Appendix

1. Cincinnati Association for the Blind is an Ohio corporation which operates a sheltered workshop. In 1976 workshop sales exceeded $2 million and the Employer sold goods valued in excess of $50,000 directly from its facility in Cincinnati, Ohio, to points outside the State of Ohio. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties stipulated, and we find, that the Petitioner is a labor organization within the meaning of the Act which claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks to represent a unit consisting of all production and maintenance employees, including shipping and receiving employees, employed by the Employer at its sheltered workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. Petitioner's requested unit includes employees not having employment disabilities and individuals having some visual or other disability (referred to as clients). The Employer contends that its workshop "clients" are not employees within the meaning of Section 2(c) of the Act and, even if they are, the Board should not assert jurisdiction over them since to do so may hinder the Employer's rehabilitative efforts. The Employer also argues that differences in skills, duties, and supervision between "clients" and nondisabled employees make Petitioner's proposed overall unit inappropriate.

Cincinnati Association for the Blind is a nonprofit corporation providing social and technical services to visually handicapped persons. One of the Employer's programs is a

sheltered workshop, at which approximately 70 "clients" and 4 nondisabled employees assemble, sew, and package products that the Employer has contracted to produce. In 1976 workshop sales and services generated a profit of $144,000 that was used to defray other expenses of the Association.

The Employer contends that *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), requires that the Board refrain from asserting jurisdiction over the workshop "clients." However, *Goodwill* is distinguishable, in our judgment, because the Employer's workshop operation differs materially from the work program in which Goodwill's "clients" participated. The Board, in its discretion, declined to assert jurisdiction over Goodwill's "clients" (individuals suffering from various types of employment disabilities) because the single overriding purpose of the "employer-client" relationship was rehabilitation. Goodwill's work program, and the production associated with it, was one element of the rehabilitation plan, not an enterprise in itself.

Goodwill's "clients" were paid uniform wages, regardless of performance, to collect discarded items and refurbish them for sale in Goodwill stores. The Employer, on the other hand, obtains contracts by competitive bidding with private firms and pays its "clients" on a piece-rate basis. Thus, the work performed by "clients" at the Employer's workshop must not only be acceptable to the Employer, but it must also meet the standards of the party who awarded the contract. The Employer's emphasis on productivity is reflected in the fact that workshop wages range from $.58 to $6 per hour.[2]

The Employer's direction of the workshop operation is significantly based on economic considerations. Unlike the situation in *Goodwill*, normal economic considerations are

[2] The Employer has obtained a sheltered workshop certificate from the Department of Labor which exempts workshop "clients" from Federal minimum wage laws.

a significant factor in the Employer-"client" relationship. The Employer's relations with workshop "clients" and the employment conditions existing at the workshop are guided to a great extent by business considerations. We therefore do not exercise our discretion to decline jurisdiction but rather find that assertion of jurisdiction over the "clients" employed at the Employer's workshop will effectuate the purposes of the Act.

We find that an overall production and maintenance unit at the Employer's workshop is appropriate. "Clients" and other employees work closely together at the workshop and perform interdependent functions. Both groups of employees share common supervision and substantially similar terms and conditions of employment. Therefore, the following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and "clients," including shipping and receiving employees, of the Employer's workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

MEMBER MURPHY, dissenting:

I would not assert jurisdiction over this Employer for the reasons stated in my and Member Penello's dissenting opinion in *Abilities and Goodwill, Inc.*, 226 NLRB 1224 (1976). See also my dissent in *Goodwill Industries of Southern California*, 231 NLRB 536 (1977).

Furthermore, despite the majority's attempt here to make the operations under consideration appear to be essentially commercial in order to distinguish the Board

majority's dismissal in *Goodwill Industries*, it is apparent—despite the existence of certain minor differences—that the Employer's so-called commercial activities are "merely ancillary to its rehabilitative object" (*Epi-Hab Evansville, Inc.*, 205 NLRB 637 (1973)) and that the Employer's "primary objectives are the converse of a normal employer's objectives" (*Goodwill Industries, supra*). Thus, here the primary concern of the Employer is to supply work for handicapped individuals (also called clients herein).

The majority's attempt to distinguish the Employer's operation from Goodwill's on the purported basis that here the Employer's relationship to its "clients" and the employment conditions affecting them are guided largely by "business considerations," whereas Goodwill's are not, misses the point. Unlike the typical commercial enterprise, the Employer does not exist for the purpose of maximizing profits, but for the sole purpose of maintaining work for the handicapped. That it must, to accomplish that purpose, be competitive with commercial enterprises in order to obtain and retain a market for its products does not alter its character or purpose. Nor does the fact it pays its "clients" on a piecerate basis as an incentive to increase their productivity so as to enable it to meet the competition and thus survive. Consequently, it is clear that under a realistic apprisal of the facts the petition should be dismissed under the majority position enunicated in *Goodwill Industries* as well as under my dissenting view in that case. The majority holding there was to the effect that the Board would not assert jurisdiction over those charitable enterprises where the employees' welfare, and not the financial success of their work activities, was the matter of primary concern.

As I would not in any event assert jurisdiction over the Employer, I find it unnecessary to reach the other issues raised in this proceeding.

APPENDIX C

Cincinnati Association for the Blind *and* Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-12914

September 18, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS, MURPHY, AND TRUESDALE

Upon a charge filed on August 30, 1978, by Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Cincinnati Association for the Blind, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint and notice of hearing on August 31, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 15, 1978, following a Board election in Case 9-RC-12066 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropri-

ate;[1] and that, commencing on or about August 25, 1978, and at all times thereaft Respondent has refused, and continues to date to refus bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 15, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 25, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. On October 5, the National Industries for the Blind (NIB) filed a motion for leave to intervene as *amicus curiae*, for reconsideration *en banc* of the Board's Decision in Case 9-RC-12066, and for oral argument. On October 16, 1978, the Regional Director for Region 9 referred to the Board the National Federation of the Blind's (NFB) motion to intervene as a party.

The Charging Party filed statements in opposition to the motions of the NIB and the NFB on October 26, 1978. On November 6, 1978, Respondent filed a motion for oral argument, *en banc* consideration, and summary judgment. The Charging Party filed a statement in opposition to Respondent's motion on November 8, 1978. The NFB, by letter dated November 22, 1978, also opposed Respondent's Motion for Summary Judgment. On January 31, 1979, as corrected on February 7, 1979, the Board issued its order granting the motions to intervene, denying the motions for oral argument, and transferring the proceeding to the

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[1] Official notice is taken of the record in the representation proceeding, Case 9-RC-12066, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follet Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Board, and a Notice To Show Cause. Respondent, the NIB, the NFB, and the Charging Party thereafter filed responses to the Notice To Show Cause.[2]

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent contends that the Union's certification was invalid because sheltered workshop clients are not employees within the Section 2(3) of the Act and an overall production and maintenance unit at the workshop is not appropriate for collective bargaining. The General Counsel argues that all material issues have been previously decided and there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 9-RC-12066, discloses that a representation hearing was held on August 31, 1977. Respondent contended at that time that (1) workshop clients are not employees within the meaning of Section 2(3) of the Act; (2) even if clients are employees, it would not effectuate the purposes of the Act to assert jurisdiction over them; and (3) a bargaining unit including all production and maintenance employees and clients is inappropriate. On May 5, 1978, the Board issued a Decision and Direction of Election asserting jurisdiction with respect to the clients employed at Respondent's workshop and finding a unit of all production and maintenance

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[2] Respondent also moved to strike two *Wall Street Journal* articles appended to the NFB's brief in support of the General Counsel's Motion for Summary Judgment and all references to the articles on the grounds that they are nonprobative, immaterial, irrelevant, and prejudicial. Since we do not rely on the articles in ruling on the Motions for Summary Judgment, we find it unnecessary to pass upon Respondent's motion to strike.

employees and clients to be appropriate. An election was conducted on June 7, 1978, in which 44 votes were cast for and 35 against the Union, with 3 challenged ballots. On June 15, 1978, the Regional Director for Region 9 issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor do we find that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

[4] As noted above, Respondent and the NIB filed motions seeking, *inter alia*, reconsideration *en banc* of the Board's decision to assert jurisdiction with respect to Respondent's sheltered workshop "clients." We deferred ruling on the requests for reconsideration in order to consider the supporting arguments. Having considered the responses to the Notice To Show Cause, we find no basis for reconsidering the decision in the representation proceeding that Respondent's "clients" are employees within the meaning of Sec. 2(3) of the Act and that the assertion of jurisdiction with respect to them will effectuate the purposes of the Act.

Appendix

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Ohio corporation engaged in the operation of a sheltered workshop at its facility located at 2045 Gilbert Avenue, Cincinnati, Ohio. During the past 12 months Respondent's workshop sales exceeded $2 million and Respondent sold goods and materials valued in excess of $50,000 directly from its facility in Cincinnati, Ohio, to points outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees and clients,

including shipping and receiving employees, of the Respondent's workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The Certification

On June 7, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervison of the regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 15, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about August 17, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 25, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 25, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Appendix

CONCLUSIONS OF LAW

1. Cincinnati Association for the Blind is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees and clients, including shipping and receiving employees, of Respondent's workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 15, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 25, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor

practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cincinnati Association for the Blind, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees and clients, including shipping and receiving employees, of the Respondent's workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to

rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at 2045 Gilbert Avenue, Cincinnati, Ohio, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER TRUESDALE, concurring:

I agree with my colleagues, Chairman Fanning and Member Jenkins, that the Respondent herein has unlawfully refused to bargain with the union. In my opinion, the Board has properly asserted jurisdiction over Respondent's clients. See *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979), especially footnote Fn. 13.

MEMBER MURPHY, dissenting:

In the underlying representation case, I would not have asserted jurisdiction over this Employer for the reasons set forth in my dissenting opinion therein[6] and in *Abilities and Goodwill, Inc.*, 226 NLRB 1224 (1976), and *Goodwill Indus-*

---

[5] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[6] 235 NLRB 1448 (1978).

tries of Southern California, 231 NLRB 536 (1977). As more fully discussed in that dissent I would not assert jurisdiction over charitable, nonprofit, noncommercial institutions which provide employment for the handicapped. Nor would I find the Employer's engagement in certain activities of a so-called commercial nature to warrant a different result, inasmuch as this Employer does not exist for the purpose of maximizing profits, but for the sole purpose of maintaining work for the handicapped. Thus, those activities of the Employer which are asserted to be of a commercial nature are "merely ancillary to its rehabilitative object." *Epi-Hab Evansville, Inc.*, 205 NLRB 637 (1973).

As a consequence, I would not find that Respondent violated Section 8(a)(5) of the Act in refusing to bargain. Accordingly, I would grant Respondent's rather than the General Counsel's Motion for Summary Judgment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-

named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees and clients, including shipping and receiving employees, of the Employer's workshop located at 2045 Gilbert Avenue, Cincinnati, Ohio, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

CINCINNATI ASSOCIATION FOR THE BLIND

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

TITLE 29—LABOR
[From the National Labor Relations Act]
Section 152. Definitions.
When used in this subchapter-

. . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

. . . .

Section 158. Unfair labor practices.
(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section

159(a) of this title.

. . . .

[From The Fair Labor Standards Act]

Section 214. Learners, apprentices, students, and handicapped workers.

. . . .

(c)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 206 of this title but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

> (A) handicapped workers engaged in work which is incidental to training or evaluation programs, and
> (B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activi-

ties centers under special certificates at wages which are less than the minimums applicable under section 206 of this title or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activites for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

. . . .

[From The Rehabilitation Act of 1973]

Section 706. Definitions.

For the purposes of this chapter:

. . . .

(11) The term "rehabilitation facility" means a facility which is operated for the primary purpose of providing vocational rehabilition services to handicapped individuals, and which provides singly or in combination one or more of the following services for handicapped individuals: (A) vocational rehabilitation services which shall include, under one management, medical, psychiatric, psychological, social, and vocational services, (B) testing, fitting, or training in the use of prosthetic and orthotic devices, (C) prevocational conditioning or recreational therapy, (D) physical and occupational therapy, (E) speech and hearing therapy, (F) psychiatric, psychological and social services, (G) evaluation of rehabilitation potential, (H) personal and work adjustment, (I) vocational training with a view toward career advancement, (in combination with other rehabilitation services), (J) evaluation or control of specific disabilities, (K) orientation and mobility services to the blind, and (L) extended employment for those handicapped individuals who cannot be readily absorbed in the competitive labor market, except that all medical and related health services

must be prescribed by, or under the formal supervision of, persons licensed to prescribe or supervise the provision of such services in the State.

. . . .

Section 721. State plans.

(a) In order to be eligible to participate in programs under this subchapter, a State shall submit to the Commissioner a State plan for vocational rehabilitation services for a three-year period and, upon request of the Commissioner, shall make such annual revisions in the plan as may be necessary. Each plan shall—

. . . .

(16) provide for (A) periodic review and reevaluation of the status of handicapped individuals placed in extended employment in rehabilitation facilities (including workshops) to determine the feasibility of their employment, or training for employment, in the competitive labor market, and (B) maximum efforts to place such individuals in such employment or training whenever it is determined to be feasible;

(17) provide that where such State plan includes provisions for the construction of rehabilitation facilities—

(A) the Federal share of the cost of construction thereof for a fiscal year will not exceed an amount equal to 10 per centum of the State's allotment for such year,

(B) the provisions of section 776 of this title shall be applicable to such construction and such provisions shall be deemed to apply to such construction, and

(C) there shall be compliance with regulations the Commissioner shall prescribe designed to assure that no State will reduce its efforts in providing other vocational rehabilitation services (other than for the establishment of rehabilitation facilities) because its plan includes such provisions for construction;

. . . .

TITLE 41—PUBLIC CONTRACTS

[From The Wagner-O'Day Act]

Section 48. Procurement requirements for the Govern-

ment; non-application to prison-made products.

If any entity of the Government intends to procure any commodity or service on the procurement list, that entity shall, in accordance with rules and regulations of the Committee, procure such commodity or service, at the price established by the Committee, from a qualified nonprofit agency for the blind or such an agency for other severely handicapped if the commodity or service is available within the period required by that Government entity; except that this section shall not apply with respect to the procurement of any commodity which is available for procurement from an industry established under chapter 307 of Title 18, and which, under section 4124 of such Title, is required to be procured from such industry.

. . . .

TITLE 42—PUBLIC HEALTH AND WELFARE
[From The Social Security Act]
Section 416.
For the purposes of this subchapter—

. . . .

(i) (1) Except for purposes of sections 402(d), 402(e), 402(f), 423 and 425 of this title, the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) blindness; and the term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less. The provisons of paragraphs (2) (A), (3), (4), (5), and (6) of section 423(d) of this title shall be applied

by purposes of determining whether an individual is under a disability within the meaning of the first sentence of this paragraph in the same manner as they are applied for purposes of paragraph (1) of such section. Nothing in this subchapter shall be construed as authorizing the Secretary or any other officer or employee of the United States to interfere in any way with the practice of medicine or with relationships between practitioners of medicine and their patients, or to exercise any supervision or control over the administration or operation of any hospital.

. . . .

RULES AND REGULATIONS, UNITED STATES DEPARTMENT OF LABOR, WAGE HOUR DIVISION
29 C.F.R., Chapter V, Part 525

. . . .

Section 525.2 Definitions.

. . . .

(b) "Sheltered workshop" or "workshop" means a charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilition for handicapped workers, and/or proving such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature.

. . . .

(d) "Handicapped worker" or "client" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury, and who is being served in accordance with the recognized program of a sheltered workshop within the facilities of such agency or in or about his home.

. . . .

Sec. 525.7 Criteria for Consideration in Issuance of a Special Certificate.—(a) The following criteria may be considered by the Administrator or his authorized representa-

tive in determining the necessity of issuing a special certificate and the conditions to be specified therein:

. . . .

(2) Whether the individual handicapped workers are being paid wages commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work;

. . . .

(4) The wages of nonhandicapped employees employed in private industry engaged in work comparable to that performed in the workshop;

. . . .

Sec. 525.9 Terms and Conditions of Special Certificates.—(a) A special certificate shall specify the terms and conditions under which it is granted.

. . . .

(f) The wage rates paid handicapped workers working at time rates shall be commensurate with those paid nonhandicapped workers in the vicinity in industry maintaining approved labor standards for essentially the same type, quality, and quantity of work.

(g) (1) The wage rates paid handicapped workers working at piece rates shall not be less than prevailing piece rates paid nonhandicapped employees in the same work in the vicinity in industry maintaining approved labor standards. In the absence of industry piece rates, time studies or other tests may be used by the workshop to establish piece rates. Such time studies should be made with nonhandicapped persons, although handicapped workers may be used in those situations where they are not handicapped for the type of work being tested and their production is comparable to that of nonhandicapped persons of average ability. The base hourly rate used in making time studies must be not less than the prevailing rate in industry for work requiring similar skill.

. . . .

Office-Supreme Court, U.S.
FILED
AUG 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2290

In the Supreme Court of the United States

OCTOBER TERM, 1982

CINCINNATI ASSOCIATION FOR THE BLIND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that blind persons working in petitioner's sheltered workshop are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and that it would effectuate the policies of the Act to assert jurisdiction over those employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2290

CINCINNATI ASSOCIATION FOR THE BLIND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 672 F. 2d 567. The decision and order of the National Labor Relations Board (Pet. App. 1c-12c) are reported at 244 N.L.R.B. 1140. The Board's decision in the underlying representation proceeding (Pet. App. 1b-5b) is reported at 235 N.L.R.B. 1448.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1982. The petition for a writ of certiorari was filed on June 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 1d-2d.

STATEMENT

1. Petitioner is a nonprofit corporation providing social and technical services to visually handicapped persons. It operates a sheltered workshop at which approximately 70 handicapped and 4 nonhandicapped employees assemble, sew, and package products which petitioner has contracted to produce. In 1976, workshop sales exceeded $2 million and generated a profit of $144,000 (Pet. App. 2b-3b). Many of petitioner's contracts were obtained by bids submitted in competition with profit-making firms (Pet. App. 3a, 3b; A. 90).[1]

Most blind workshop employees are paid on a piece-rate basis—that is, their wages are determined by how many items they produce or package per hour. A few blind employees and all sighted workers are paid on an hourly basis (Pet. App. 3a). Employees paid on a piece-rate basis earn wages ranging from $.58 to $6 per hour (Pet. App. 3b).[2] Both blind and sighted workers work from 8:30 a.m. to 4:30 p.m., five days a week. Blind workers receive holiday pay, vacation pay, workmen's compensation insurance, and life insurance. Sighted employees receive all of these benefits and a pension plan as well (Pet. App. 4a).

All workshop employees are supervised by the workshop manager, two contract shop supervisors, the paper products supervisor, and the quality control supervisor. Blind workers are suspended or terminated for serious misconduct such as violence or theft. They are not suspended or terminated for production errors, but are expected to produce goods meeting the quality standards of the marketplace. A handicapped worker who is twice reprimanded for

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[1] "A." refers to the appendix in the court of appeals.

[2] Petitioner is permitted, under a sheltered workshop certificate obtained from the United States Department of Labor, to pay its blind employees less than the minimum wage (Pet. App. 3a-4a).

production errors is referred to the Work Evaluation Unit for "retraining," and is paid at a reduced rate or not at all (Pet. App. 3a-4a). The workshop does not have vocational or rehabilitation counselors or social workers on its staff (A. 404). Workers wishing to utilize the social services offered by petitioner must seek them in the same manner as blind members of the community who are not employed by petitioner (Pet. App. 11a).

Blind employees are referred to the workshop by caseworkers, but the final hiring decision is made by the workshop manager (Pet. App. 3a). The workshop offers long-term employment with little emphasis on the acquisition of skills which would enable the blind workers to obtain employment elsewhere (Pet. App. 11a). Very few blind workers leave petitioner's employ to enter the competitive job market (Pet. App. 4a).

2. The Board (Member Murphy dissenting) found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union[3] which, pursuant to the results of a representation election, had been certified by the Board as the bargaining representative of petitioner's blind and sighted production and maintenance employees and its shipping and receiving employees (Pet. App. 1c-12c).

In ordering an election among petitioner's employees, the Board (Member Murphy dissenting) rejected petitioner's contention that it should decline to assert jurisdiction over petitioner's employees because of the rehabilitative purposes of the workshop. Distinguishing *Goodwill Industries of Southern California*, 231 N.L.R.B. 536 (1977), the Board

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[3]Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

pointed out that there the work program "was one element of the rehabilitation plan, not an enterprise in itself" (Pet. App. 3b). The Board added that here, unlike there, the product had to meet normal commercial standards and "normal economic considerations [were] a significant factor in the [employee-employer] relationship" (Pet. App. 3b-4b).

The Board further found that "an overall production and maintenance unit" was an appropriate bargaining unit, noting that sighted and blind employees "work closely together at the workshop and perform interdependent functions. Both groups of employees share common supervision and substantially similar terms and conditions of employment" (Pet. App. 4b).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-12a). The court first rejected petitioner's argument that Congress intended to exclude handicapped workers in sheltered workshops from coverage under the Act. The court noted that the Act contains no explicit exclusion of such workers and found no evidence in the legislative history of the Act or of other federal statutes dealing with the handicapped that Congress intended to deny handicapped workers the right to bargain collectively (Pet. App. 4a-7a).

The court then found that the Board had an adequate factual basis for characterizing petitioner's workers as employees (Pet. App. 8a-9a). It also rejected petitioner's contention that the Board should have declined to assert jurisdiction, as it had in *Goodwill Industries of Southern California*, *supra* (Pet. App. 9a-10a). The court agreed with the Board that "the circumstances of the *Southern California* case differ materially from the situation at the Cincinnati workshop" (Pet. App. 11a). Noting Goodwill's short-term employment policies and the job placement,

counseling, and other social services offered, the court pointed out that "in a very real sense, Goodwill operated a rehabilitative vocational clinic" (*ibid.*).

ARGUMENT

The Board's position, upheld by the court of appeals, is that handicapped workers in sheltered workshops are employees within the meaning of the Act. However, where it has found that the employer's primary objective was rehabilitative—where the employer "might better be classified as a vocational clinic than as a viable entrepreneurial concern"—the Board has exercised its discretion not to assume jurisdiction over a sheltered workshop. *Goodwill Industries of Southern California, supra*, 231 N.L.R.B. at 537. On the other hand, where working conditions do not differ substantially from those normally found in private industry, the Board has asserted jurisdiction despite the existence of an element of rehabilitation in the work. See *Chicago Lighthouse for the Blind*, 225 N.L.R.B. 249, 250 (1976). Petitioner urges that treating handicapped workers in sheltered workshops as employees under the Act is inconsistent with congressional intent, and that even if such workers are statutory employees, its mission is primarily rehabilitative within the standard of *Goodwill Industries of Southern California, supra*. There is no merit to these contentions.

1. Petitioner's contention (Pet. 17-20) that its blind workers are not "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3),[4] is not based on any

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[4]Section 2(3) provides that the "term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise * * *." It then excludes certain workers, such as agricultural workers and supervisors, from the definition.

language in the Act. Nor does petitioner contend that anything in the legislative history of the Act shows a congressional intent to exclude handicapped workers from its coverage.[5] Rather, petitioner argues (Pet. 17-20) that collective bargaining is inconsistent with other federal statutes dealing with sheltered workshops. But, again, petitioner points to nothing in the language or legislative history of these statutes which would indicate that Congress intended to deny bargaining rights to its workers. As the court of appeals observed (Pet. App. 6a-7a), the statutes cited by petitioner indicate a congressional concern to favor sheltered workshops, but do not establish that Congress considered collective bargaining incompatible with that goal. Indeed, the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., one of the statutes relied on by petitioner, filed an amicus brief in the court of appeals stating that "assertion of jurisdiction by the NLRB over workers in a sheltered workshop neither conflicts with the FLSA sheltered workshop provisions nor is detrimental to the objectives of these provisions"[6] (Amicus Br. 2-3).

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[5]Petitioner points to the fact (Pet. 20) that Congress did not enact several bills which would have explicitly subjected sheltered workshops to Board jurisdiction. However, " '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971). As the court of appeals recognized (Pet. App. 5a), congressional inaction on these bills is as consistent with a belief that sheltered workshops were already covered by the Act as with a belief that they should not be covered.

[6]The Secretary noted that the FLSA sets minimum wages and working conditions for such employees, but does not preclude them from seeking higher wages or better working conditions through collective bargaining (Amicus Br. 9-10). In particular, the Secretary refuted petitioner's contention (Pet. 18-19) that the sheltered workshop would lose certification in the event of a strike. He pointed out that the regulation quoted by petitioner (29 C.F.R. 525.8(d)) does not require the revocation of an existing sheltered workshop certificate in the event of a strike,

In sum, as the court of appeals correctly concluded, petitioner has shown nothing to justify "carv[ing] out an exception to the plain language of Section 2(3) of the Act" (Pet. App. 7a).

2. Petitioner is mistaken in its claim (Pet. 12-13) of a conflict among the circuits. The Fifth Circuit has granted the Board's petition for rehearing and vacated its decision in *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F. 2d 206 (1981), rehearing granted, 679 F. 2d 379 (1982), the case on which petitioner relies for its assertion of a conflict. Petitioner's further contention (Pet. 13-17) that the facts of this case are indistinguishable from those in *Goodwill Industries of Southern California*, *supra*, merely takes issue with the Board's contrary factual findings, which were upheld by the court of appeals. This evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the Board properly found that the working conditions at petitioner's workshop were more similar to conditions in private industry than the primarily rehabilitative situation in *Goodwill Industries*. In *Goodwill Industries*, competence played no part in determining either the hiring or the pay rates of workers; they received the same pay regardless of their production. 231 N.L.R.B. at 537.[7] Here, blind workers were not only paid on the basis of

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but only prohibits issuance of a new certificate so that the outcome of the labor dispute would not be influenced by the Department of Labor regulations (Amicus Br. 12-13).

[7]Petitioner disputes this (Pet. 15-16), asserting that the employees in *Goodwill Industries* must have been paid on the basis of productivity because such payments are required by Department of Labor regulations dealing with sheltered workshops. As the Secretary of Labor pointed out in his amicus curiae brief to the court of appeals (Amicus Br. 8-10), the regulations require payment on the basis of productivity

productivity, but suffered reprimands and reduction in pay for production errors. Moreover, in *Goodwill Industries* the employer designated half its jobs as short-term and actively sought employment elsewhere for its workers (231 N.L.R.B. at 537)—a procedure totally unlike that followed by most private employers. Petitioner, on the other hand, offers long-term employment with little or no emphasis on helping its blind workers find jobs elsewhere. Furthermore, in *Goodwill Industries*, counseling and other social services were an integral part of the worker's relationship with the employer (*ibid.*)—a situation not normally found in private industry, and one which suggested that rehabilitation was the primary object of that relationship. Here, blind workers receive only the social services which are equally available to all blind members of the community.[8]

3. Petitioner raises (Pet. i), but does not argue, the issue whether the Board abused its discretion by including both handicapped and nonhandicapped employees in the same bargaining unit. This factual issue does not warrant further review by this Court. In any event, it is well settled that "[t]he issue as to what unit is appropriate for bargaining * * * involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). In this case, the Board found that a unit including both handicapped and nonhandicapped

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only if employees are paid less than the statutory minimum wage; they do not preclude the payment of a uniform wage rate equal to or greater than the statutory minimum.

[8]As the court of appeals noted (Pet. App. 7a), assuming arguendo that petitioner's complaint (Pet. 20-23) that collective bargaining would interfere with the therapeutic and rehabilitative functions of sheltered workshops is well-founded, it had no application here where rehabilitative concerns are "subordinated to routine business considerations."

workers was appropriate because the two groups of employees worked closely together, performed interdependent functions, and shared common supervision and substantially similar terms and conditions of employment (Pet. App. 4b). Petitioner sets forth no basis for concluding that the Board's unit determination was an abuse of discretion.[9]

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[9]The fact (Pet. 9) that handicapped and nonhandicapped employees have different functions—the former doing production work and the latter doing maintenance work and shipping and receiving—does not show that they may not be included in the same unit. The Board has frequently held that maintenance employees and shipping and receiving employees may be included in the same bargaining unit with production employees. See, *e.g.*, *Dundee Cement Co.*, 170 N.L.R.B. 422, 424 (1968); *Riker Laboratories*, 156 N.L.R.B. 1099, 1100-1101 (1966).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CINCINNATI ASSOCIATION FOR THE BLIND,

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUPPLEMENTAL STATEMENT OF THE CASE

The Petitioner in this controversy, the Cincinnati Association for the Blind (hereinafter referred to as the "Association") adopts the Statement of the Case set forth in its Petition for Writ of Certiorari in this case, which was filed on June 11, 1982.

In its Petition the Association set forth several reasons in support of the granting of the Writ of Certiorari. See Petition, pages 11-23. One of these reasons was the conflict

between the United States Courts of Appeals for the Fifth and Sixth Circuits. In the Sixth Circuit, a National Labor Relations Board's order requiring the Association to bargain with Local 100 of the Teamster Union concerning a bargaining unit including blind and disabled sheltered workshop clients was enforced. *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982). A similar NLRB order had previously been denied enforcement by the Fifth Circuit in *NLRB* v. *Lighthouse for the Blind*, 653 F.2d 206 (5th Cir. 1981). This conflict was recognized by the Sixth Circuit. *Cincinnati Association for the Blind* v. *NLRB*, *supra* at 574.

This decision by the Fifth Circuit was extant at the time the Petition in the instant case was filed. However, on June 17, 1982, the Fifth Circuit granted rehearing in the *Houston* case and withdrew and vacated its 1981 judgment. *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), rehearing granted, 679 F.2d 379 (5th Cir. June 17, 1982). Thus, rehearing was granted after the Petition for Writ of Certiorari was filed in the instant case.

Oral argument before the Fifth Circuit in *Houston*, *supra*, is scheduled for October 6, 1982. Counsel for the Petitioner is informed by the Clerk of the Fifth Circuit that the average time between oral argument and decision is approximately ninety days.

ARGUMENT

The purpose of this Reply Brief is to set forth the position of the Petitioner, the Cincinnati Association for the Blind, with respect to the recent decision of the United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), *rehearing granted*, 679 F.2d 379 (5th Cir. 1982). Because the Fifth Circuit's decision granting rehearing was issued

after the filing of the Petition in this case, it was raised for the first time in the Brief in Opposition.

1. In *Houston, supra*, the Fifth Circuit originally refused to enforce a National Labor Relations Board order asserting jurisdiction over the blind and disabled clients in the sheltered workshop of the Lighthouse for the Blind of Houston, because that order was "not supported by substantial evidence." *Id.*, 653 F.2d at 210.

After the filing of the Petition for Certiorari by the Association in the instant case, the Fifth Circuit vacated its refusal to enforce the NLRB's order and granted a rehearing on the matter. Thus, the Fifth Circuit has not agreed with the decision of the Sixth Circuit in *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982).

Rather, the Fifth Circuit has decided to reconsider its decision in that matter. The Fifth Circuit will either reassert its order refusing to enforce the Board's order or change its position and enforce the NLRB Order. The former will reinstitute the conflict between the Fifth and Sixth Circuits; the latter will end the conflict.

As discussed in detail in the Association's Petition for Certiorari in this case, the imposition of jurisdiction by the NLRB over the blind and disabled clients in the Association's sheltered workshop would diminish the Association's ability to provide its important rehabilitation and therapeutic services to these individuals. See especially, pp. 17-23 of the Petition. The NLRB articulated and applied this view in *Goodwill Industries of Southern California*, 231 NLRB 536 (1977).

This issue has generated substantial ligiation. Conflicting decisions have been issued by the NLRB. The Fifth Circuit's decision to reconsider its decision in *Houston, supra*, adds an additional dimension to this conflict. It emphasizes the complex and difficult nature of the issue and the need for definitive resolution by this Court.

For these reasons, the Cincinnati Association for the Blind urges this Court to accept and decide this controversy.

Alternatively, the Association urges this Court to hold this matter in abeyance until the Fifth Circuit again issues a decision in the *Houston* controversy. Oral argument is scheduled for October 6, 1982. Thus, a decision is likely to be reached by the Fifth Circuit relatively soon.

Under these circumstances awaiting the Fifth Circuit's decision in *Houston*, *supra* before ruling on this Petition for Certiorari will foster an early resolution to the fundamental issue by this Court.

In addition, unnecessary injury to the Association's sheltered workshop may be avoided by awaiting the Fifth Circuit's decision. If the Sixth Circuit's decision here were to remain in effect because of the denial of the Writ of Certiorari, and this Court later refuses to enforce a similar Board order in another controversy involving the same issue, the ability of the Cincinnati Association's workshop to provide its services to its blind and disabled clients will have been needlessly diminished. This is especially true if the Fifth Circuit's decision on rehearing, re-establishing a conflict between circuits, would be the basis on which Certiorari is granted in that other controversy.

Under these circumstances, if Certiorari is not now granted in this case, a decision on whether to grant the Writ of Certiorari should be delayed until the Fifth Circuit has again issued its decision in the *Houston* case.

2. On page 7 of the Brief in Opposition, the following sentence appears:

> "Petitioner is mistaken in its claim (Pet. 12-13) of a conflict among the circuits."

From this sentence it might be erroneously inferred that the Petition for Certiorari filed by the Cincinnati Association for the Blind either intentionally misstated the state of the law or failed to properly cite *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F.2d 206 (5th Cir. 1981), *rehearing granted*, 679 F.2d 379 (5th Cir. June 17, 1982).

In fact, a clear, recognized conflict between the Fifth and Sixth Circuits existed at the time of the filing of the Association's Petition for Certiorari on June 11, 1982. Compare *Cincinnati Association for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir. 1982), with *NLRB* v. *Lighthouse for the Blind of Houston, supra*. This conflict between the circuits was altered only by the subsequent decision of the Fifth Circuit, a fact which was not mentioned at all in the Brief in Opposition.

For these reasons, any inference that no conflict between the Fifth and Sixth Circuits existed at the time of the filing of the Association's Petition for Certiorari would be unfounded and must be disregarded.

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